In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1007

COE A. BOARDMAN AND MARTHA BOARDMAN, HIS WIFE, AND FRANK J. SMITH AND THERESE E. SMITH, HIS WIFE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims is reported at 376 F.2d 895 (Pet. App. 24–33).[1] The findings of fact of the Trial Commissioner, adopted by the Court of Claims, are printed as an appendix to this brief, *infra*, pp. 9–19.

JURISDICTION

The judgment of the Court of Claims was entered on May 12, 1967. A timely petition for rehearing was

[1] "Pet. App." refers to the Court of Claims opinion printed in the appendix to the petition. "App." refers to the Commissioner's findings, adopted by the court and printed as an appendix to this brief.

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denied October 13, 1967 (Pet. App. 34). The petition for a writ of certiorari was filed January 10, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether the Court of Claims correctly held that petitioners' suit for compensation for the taking of an avigation easement over their property was barred by the statute of limitations, 28 U.S.C. 2501, because there had been substantial sustained interference with the use and enjoyment of their property by low and frequent overflights of aircraft more than six years before institution of the suit.

STATEMENT

Petitioners, who are real estate developers, bought 122.32 acres of wooded land across a road from the northwest boundary of the Willow Grove Naval Air Station at Willow Grove, Pennsylvania, in June 1955. Activity at the Air Station was at that time in the process of being expanded. In the following month, July 1955, a 4,000-foot extension to the northwest end of the main runway became operational for jet aircraft (Pet. App. 26–27; App. 9).

The end of this extended runway is about 2,500 feet from the near edge of petitioners' land. A projection of the runway would cross petitioners' tract which also lies entirely within the approach zone to the runway. Planes taking off and landing fly through that portion of the approach zone at low altitudes (Pet. App. 26–27; App. 10).

Prior to July 1955, nearly all the flights at the airfield had been by propeller-driven aircraft.[2] Immediately after extension of the runway, a number of single-engine F–9 and T–33 jet fighter planes were transferred to the Station in an active program to convert reserve pilots of conventional planes into jet pilots. This conversion involved more intensive use of the airfield. Commencing in September 1957, the F–9 jets were gradually replaced by more powerful F–1 jets (Pet. App. 26–27).

Petitioners instituted this suit on December 5, 1963, to recover $300,000 representing claimed depreciation in the market value of their land caused by the overflights. The Court of Claims sustained the government's contention that the action was barred by the six-year jurisdictional time limitation contained in 28 U.S.C. 2501 (Pet. App. 25; App. 9, 19). Under that statute, the present suit is not available for claims that accrued prior to December 5, 1957.

The Court of Claims found that the jet overflights reached the level of substantial interference at least by the summer of 1956 (Pet. App. 32). The evidence showed that, relative to that summer, the owner of a summer day camp for children, operated on a 21.55-acre piece of petitioners' original tract which they had sold in May 1956, complained to the Navy of "the deafening roar * * * at extremely low altitudes * * * directly over the camp" and referred to the children

[2] The Air Station has been in operation since 1943. After World War II, it has been used as a flight training center for reservists of the Navy, Marines, and Air Force and the Air National Guard (Pet. App. 26).

as having been "frightened to tears" (Pt. App. 27–28; App. 14–15). Since the camp operated only during weekdays and the principal flight activity was on weekends, it appeared obvious to the court that the situation was even more distressing on weekends (Pet. App. 28).

In the summer of 1955, petitioners applied to the Federal Housing Administration for approval of a preliminary development plan in order to obtain the benefits of the FHA loan insurance program. The approval was refused because of an FHA policy, adopted in 1954, which prohibited loan insurance coverage to properties adjacent to airports (Pet. App. 28; App. 17–18). Similarly, in the summer of 1955, petitioners submitted their preliminary development plan to the local planning commission which returned it for certain corrections. Petitioners' plan remained inactive until 1960 when they resubmitted it, with a subsequent alteration early in 1961 to meet new zoning requirements. But the planning commission advised the county supervisors that it was not in favor of developing the property for high density residential use due to the risk involved from its location in the approach zone of the most active runway at the Air Station (Pet. App. 29; App. 18).

The court rejected petitioners' contention that their cause of action accrued on August 27, 1961, by a process of culmination brought about by the dramatic effect of the crash of an aircraft on that date, coupled with seven years of jet flight operations (Pet. App. 29). That crash was about 2½ miles southeast of petitioners' property

and off the airfield (App. 17). There had been 17 airplane crashes on or in the vicinty of the Air Station in the 17 years before August 1961 (and four since). The court concluded that there is no basis for singling out one of the many such accidents as the sudden cause of public recognition that this property in the approach zone was unsuitable for homesites (Pet. App. 30).

ARGUMENT

Flights of aircraft over private land constitute a taking where they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. *United States* v. *Causby*, 328 U.S. 256, 265. The approach it has taken in applying that test has been expressed by the Court of Claims in *Jensen* v. *United States*, 158 C. Cls. 333, 305 F. 2d 444, 447, as follows:

> Some annoyance must be borne without compensation * * *. The point when that stage is passed depends on a particularized judgment evaluating such factors as the frequency and level of the flights; the type of planes; the accompanying effects, such as noise or falling objects; the uses of the property; the effect on values; the reasonable reactions of the humans below; and the impact upon animals and vegetable life. * * *

On the basis of this well-established approach, the court found that the "taking" in the present case had occurred no later than the summer of 1956. That conclu-

sion has strong support in the evidence, and there is nothing that compels a contrary conclusion.[3]

The ruling presents no conflict with any decision of this Court or of any other court. The Court of Claims decisions recited by petitioners (Pet. 8, 14–15) merely reached a different result from different combinations of the above-recited factors. They represent differing applications of a rule that has been developed by the Court of Claims case-by-case in applying *Causby*.

The concept of a "gradual" or "incipient" taking sought to be invoked from the flooding situation in *United States* v. *Dickinson*, 331 U.S. 745, even if it were applicable to overflights of aircraft, is not available here, because a very substantial and sustained interference with the enjoyment and use of petition-

[3] The change in flight pattern from a left turn to a right turn, referred to by petitioners as having occurred in 1958 (Pet. 4, 14), occurred in 1957 (App. 11). The change apparently pertained only to properties beyond petitioners' land (see Pet. App. 27). Because petitioners' tract lay entirely within the approach zone (Pet. App. 26), under either pattern the planes flew directly over petitioners' property at low altitude. Similarly, the introduction of F–1 jets, referred to by petitioners as having occurred in 1959 (Pet. 14), occurred in September 1957 (Pet. App. 27; App. 10–11). These jets cleared petitioners' property at higher elevations than the F–9's which they replaced (App. 11).

The mere fact of the rejection of petitioners' subdivision plan in 1961 does not establish the effect of the 1961 crash on that rejection. The court noted that petitioners voluntarily elected to postpone reapplying to the planning commission until 1960. The same reasons for disapproving a high-density residential subdivision in the approach zone existed in 1955 as in 1961, and there is no reason to believe that the commission would have ignored these reasons in 1955 if petitioners had pursued their initial application at that time (Pet. App. 29–30).

ers' land from flights by jet aircraft had occurred and stabilized at least by the summer of 1956.

Moreover, the *Dickinson* principle is not applicable. That decision dealt with rising waters impounded by a dam. The rise was by planned "successive stages" (331 U.S. at 746). The Court merely held that the landowner could await the completion of those planned stages, to ascertain the extent of the damage, before bringing an action. Here, there is no comparable stabilized period to await. What was taken here was established when airplanes interfered with petitioners' use and enjoyment of their property by commencing to fly over it frequently and at low altitudes. It was obvious from the location of the runway, or readily ascertainable from the Navy, that flights would continue for an indefinite time and in fluctuating numbers at the will of the government.

There were no planned "successive stages" or "continuing process of physical events" (331 U.S. at 749) as to altitudes or numbers comparable to rising waters behind a completed dam which would inevitably stabilize within a certain time. It is unlikely that the operation of a military air base would ever become stabilized in the sense apparently intended by petitioners. To apply *Dickinson* to the flight of planes at an airfield in the manner sought by petitioners would virtually make 28 U.S.C. 2501 inapplicable to airfields.[4]

[4] If the Government should abandon an air base, after intensive low overflights over a period of several years, it is doubtful that landowners who had suffered economic loss would acquiesce in a concept that the situation has now "stabilized" so that no compensation is owing. Additional problems as to prematurity under petitioners' theory would be presented in intermediate factual situations.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1968.

APPENDIX

FINDINGS OF FACT

1. This action was filed on December 5, 1963, to recover $300,000, representing the claimed depreciation in market value of a parcel of land located in Horsham Township, Montgomery County, Pennsylvania, allegedly caused by low and frequent flights of military jet aircraft while operating from the Willow Grove Naval Air Station at Willow Grove, Pennsylvania. The property, consisting of 100.77 acres of vacant land, is located in the approach zone to the northwest end of the northwest-southeast runway of the air station at distances from the end of the runway ranging from approximately 2,500 feet to 6,000 feet. The property is bounded on the north by Park Road and partially on the south by Keith Valley Road, which is the northern boundary of the air station.

2. The Willow Grove Naval Air Station was established as a flying field during World War II and has been in continuous operation as such since then. Originally, it had an east-west runway and a northwest-southeast runway. By July 1955, a 4,000-foot extension to the northwest end of the northwest-southeast runway became operational for jet aircraft. It was completed in October 1955.

3. The air station is used as a training field for pilots in the Reserves of the Navy, Marines, and Air Force, and for the Air National Guard. The 512th Wing of the Air Force Reserves was assigned to the station in August 1958. The 111th Group of the Air

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National Guard commenced to operate from the station in the spring of 1963.

4. With one exception, the aircraft assigned to the air station prior to July 1955 were single-engine and multi-engine propeller-driven types. The exception was that for a period starting in 1950 a Phantom 1 twin-engine fighter jet operated there, and was capable of taking off and landing on the runway prior to its extension in 1955. Some propeller-driven aircraft are still operating from the air station.

5. Prior to the 4,000-foot extension to the northwest-southeast runway in 1955, all aircraft approaching the air station for landing on the northwest end of the runway under the Ground Control Approach system (GCA)[1] flew over the plaintiffs' property at altitudes above ground level ranging from 462 feet to 479 feet, with a possible lower variance of 50 feet, depending on atmospheric conditions, type of aircraft, and pilot performance. Following the extension of the runway in 1955 the height of aircraft over plaintiffs' property in the course of GCA landings varied from 220 to 303 feet above ground level, still with a 50-foot margin of error. These calculations take into consideration the sloping elevation of plaintiffs' property from its north to south boundaries. Approximately 10 percent of all landings were GCA; the rest were visual (VFR).

6. None of the jet aircraft which operated from the air station to 1963 were supersonic or were equipped with afterburners. The first jet aircraft to operate there following the extension of the northwest-southeast runway in July 1955 were F–9 and T–33 single-engine jets. The F–9's remained there until June 1958,

[1] A 3-degree angle. GCA landings were made under adverse weather conditions.

being gradually replaced with F–1's starting in September 1957. The T–33's are still operating.

7. On takeoffs to the northwest the F–9 would enter the southern boundary of plaintiffs' property at approximately 200 feet above ground level and would exit the northern boundary at 350 to 500 feet above ground level. The F–1, which had a more powerful engine than the F–9 and was somewhat more noisy, had superior flight characteristics and would clear the plaintiffs' property at higher elevations than the F–9. In takeoff characteristics the T–33 was somewhere midway in performance between the F–1 and the F–9. The aircraft gained altitude more rapidly in cold weather than in warm weather. The height statistics would vary within 50 feet of the given altitudes, depending on the type of mission and the experience of the pilot. The aircraft would not commence their turns from the center line of the runway extended until they were 1,000 feet above ground level, which placed them beyond the northern boundary of plaintiffs' property at that time. In GCA landings all three of these jet aircraft would follow the prescribed glide angle, but on visual landings the F–9 would cross the plaintiffs' property at a lower elevation than the F–1. In 1957 the traffic pattern for visual landings was changed by shifting the downwind leg of the circular visual pattern from the east side of the runway to the west side in order to avoid overflights over certain residential areas, churches and schools.

8. The number of jet aircraft assigned to the air station from 1955 through 1963 varied from two in June 1955 to a high of 48 in March 1958. At selected dates they varied in number and types as follows:

	F-9	F-1	T-33	Total
December 1955	31		3	34
August 1956	32		5	37
December 1957	32	9	4	45
March 1958	31	13	4	48
March 1959		36	7	43
December 1959		18	4	22
September 1961		15	2	17
December 1963		18	3	21

The jet inventory commenced to decrease in December 1959, and thereafter until the end of 1963 reached a high of 30 aircraft (June 1963) and a low of 17 (June, September and December 1961). The reduction in jet inventory was due to the training of Reserve pilots in propeller-driven aircraft for antisubmarine warfare, rather than in jets. The propeller-driven aircraft used for antisubmarine training crossed the plaintiffs' property at higher altitudes than the jets while taking off to the northwest.

9. Jet operations commenced at the air station in 1955 with nine jet fighter squadrons of selected Navy and Marine Reserves (so-called "weekend warriors" because their flights were concentrated on weekends). Each squadron had 24 pilots who, from July 1955 to 1957, underwent extensive transitional training from propeller-driven aircraft to jet aircraft. Six officers were assigned to train them. In training the officers would "chase" the trainees in a separate aircraft, exercising control by voice communication over the radio. After qualifying for flying jet aircraft the trainees would fly alone, mostly on weekends.

10. From July 1955, when the extended northwest-southeast runway became operational, until the end of 1955, a total of 31,315 takeoffs and landings were executed at the air station. Comparable statistics for succeeding years are as follows:

1956—44,923 (excluding one month when the runway was being resurfaced and was not used)
1957—21,777 (nine months only)
1958—18,857 (six months only)
1959—48,737
1960—46,762
1961—42,256
1962—49,954
1963—52,116

Most of the foregoing takeoffs and landings were by jet aircraft, and about half of the takeoffs, because the prevailing winds are from the northwest, were to the northwest and over plaintiffs' property. The plaintiffs contend that, until 1960, they did not have actual knowledge of the habitual flights of aircraft over their property. At that time they offered to sell air rights over the property to the Navy, without results.

11. The 100.77 acres involved in this action are part of the plaintiffs' original purchase on June 13, 1955, of 122.32 acres. They acquired it for the purpose of subdividing and building homes for sale. From November 1956 to August 1957 the plaintiffs removed large trees from the property in preparation to develop it. In the meantime, on May 8, 1956, they sold 21.55 acres of the property fronting on Keith Valley Road (the southern boundary) to a Mr. Shore. This 21.55 acres, which contained an old mansion and some farm buildings, was converted into a children's summer day camp, known as the Silver Arrow Day Camp, which operated from Monday through Friday in July and August of each year.

12. In the summer of 1956 the Silver Arrow Day Camp was operated on the 21.55 acres of the property under the counsellorship of one Leonard Barmat, who operated the same camp under a lease during the suc-

ceeding summers of 1957 to 1961. Mr. Barmat customarily spent each weekend at the camp to prepare activities for the ensuing week. Appearing as a witness for the defendant, Mr. Barmat testified that during the weekdays there were at least 15 flights by jet aircraft each day at low altitudes over the camp property, and that jet activity on weekends was extremely heavy. By the following letter of January 17, 1957, to the commandant of the air station, Mr. Barmat complained of the frequency and low altitudes of the jet flights over the camp property and requested that the operations be shifted to another runway because of the risk and disturbance:

> May I call your attention to the fact that I am the operator of a children's day camp, which houses 150 children, operates during the months of July and August, and is situated less than a half-mile from the Willow Grove Naval Air Station. The camp is named Silver Arrow Day Camp at Keith Valley Road between County Line and Davis Grove Road. A most dangerous situation exists in that one of your runways for jet plane takeoffs and landings is directly in line with our camp.
>
> We are very much concerned as to the safety of our children with your aircraft flying at extremely low altitudes and directly over the camp.
>
> We do not have to elaborate on the deafening roar of the jet planes when they are only a hundred feet overhead. Neither do we have to stress the extreme danger involved with the planes taking off and landing directly above our children. We are greatly alarmed about this precarious situation. Last summer, many of our children were frightened to tears because of the closeness of the jet aircraft.
>
> We hope that in bringing this perilous condition to your attention, you can take the necessary precautionary safety measures during the

two month period when our camp is in session, to safeguard the health of our children. We do not want to greatly curtail the aerial activity at the Naval Air Station, but feel that one important safety measure would be for the flights to originate and end from another runway—one not directly in the path of the children. There are probably many other safety measures which you can enforce to further insure our camp's safety.

We are only interested in these extra-precautionary steps being enforced during the hours when our children are at camp—from 9 a.m. to 4 p.m., Mondays through Fridays, during July and August only. Our children return home daily at 4 p.m. and are not at camp on Saturdays and Sundays, nor during the other 10 months of the year.

We have a tremendous responsibility and obligation to the parents for the complete safety of their children while they are at camp. We hope you can clearly understand our position, and thereby take the proper measures to rectify this hazardous predicament.

I would appreciate hearing from you relative to this matter.

13. The following reply was addressed to Mr. Barmat by the commandant of the air station on February 21, 1957:

This is to acknowledge receipt of your letter of 17 January regarding annoyance by aircraft from Naval Air Station, Willow Grove.

I am sure you realize that due to the proximity of your camp to this station a certain amount of disturbance from aircraft operation is inevitable. At the outset, I wish to assure that it is our sincere desire to conduct flight operations in such a manner as to minimize annoyance by our aircraft to the local residents, but, at the same time, conduct such operations to insure maximum safety of flight.

Considering that reserve aviators must maintain their combat readiness in order to fulfill the national defense mission assigned to the Naval Air Reserve, and the fact that propeller type aircraft could not longer be effectively used for this purpose, a transition to jet aircraft was commenced at this activity in June of 1955. Accordingly, a single runway, running from northwest to southeast was lengthened to approximately eight thousand (8,000) feet and it is the sole runway which can adequately handle jet aircraft. Since the Silver Arrow Day Camp is located approximately three thousand (3,000) feet from the northwest extremity of the runway, it is conceivable that under certain wind and atmospheric conditions, it is in the line of flight of aircraft landing on runway 15 or taking off from runway 33. In either case, the area is not congested and it is considered that an emergency could be negotiated without endangering the children.

It is my policy to treat each complaint individually in the hope that prompt adjustment will alleviate the problem. However, any alteration to operational procedure is made with safety as the primary consideration, and in a case such as this, a turn-away in the initial phase of a take off run would not only endanger the pilot but the community as well.

Flying at this activity is largely done by Naval Reserve aviators who, due to their civilian occupations must maintain their readiness on week-ends, plus one two-week active duty cruise each year. These aviators usually sacrifice their summer vacations for this purpose; therefore, the months of July and August are necessarily the most active. However, since the transition from propeller to jet type aircraft was largely completed in the summer of 1956, which included many take offs and landings, it is anticipated that the annoyance of low flying

jet aircraft will be appreciably reduced this summer.

Please be assured that the Navy is acutely aware of the disturbance caused by military aircraft and is taking every step possible, consistent with the requirements of national defense, to alleviate this disturbance. It is my sincere hope that you, as well as the many others throughout the country, who are being caused discomfort, will find it is possible to bear with us in our efforts toward this end.

14. On August 27, 1961, an F–1 jet, while approaching for a landing at the southeast end of the air station, crashed into a building known as the Bargain City Store located approximately 2½ miles southeast of the plaintiffs' property, causing extensive property damage and personal injuries. In the 17 years prior to the Bargain City Store crash, there had been 17 airplane crashes in, and in the area of, the Willow Grove Naval Air Station. In the two years following the Bargain City Store crash there were four other airplane crashes in, and in the area of, the air station, including one in which the airplane crashed on Keith Valley Road, destroying a building occupied by the Green Valley Day Camp and three automobiles, killing seven persons and injuring 22 others.

15. At the time they purchased the property in suit in June 1955, the plaintiffs had prepared a preliminary plan for its development dated April 18, 1955. In the summer of 1955 coplaintiff Frank Smith informally presented his preliminary development plan to the office of the Federal Housing Administration in Philadelphia, Pennsylvania, and requested a subdivision analysis in order to ascertain whether or not the FHA would insure loans for houses on the property. The FHA appointed an underwriting committee to inspect the property, which concluded and advised

Mr. Smith that the FHA would not insure loans because of the location of the property in the approach zone of the northwest-southeast runway at the air station. This was in accordance with the policy adopted by the FHA in or about 1954.

16. In the summer of 1955 the plaintiffs also submitted their preliminary development plan of April 18, 1955, to the Planning Commission of Horsham Township, for a determination as to whether or not it met the zoning requirements. At that time the Planning Commission felt that there were technical errors in the layout of the streets, as well as a drainage problem that had not been properly met, and directed plaintiffs to rework the plan. Thereafter the plaintiffs' plans to develop the property remained inactive for a few years until 1960, when they sold a lot on the property to one Donald Carson [2] and revived their interest in developing the entire property, engaging an engineer and representatives to rework the plans and resubmit them to the local authorities. The development plan was revised in August 1960, and again in January and February 1961, in order to meet certain zoning changes made subsequent to 1956, requiring larger areas and more frontage feet for lots in the proposed subdivision. The revised plan appeared to meet the Township zoning requirements, but in 1961 the Planning Commission advised the county supervisors in writing that it was not in favor of developing the property for residential use of high density because of the air traffic over it, due to the risk involved in its location in the approach zone of the most active runway at the air station.

17. By reason of the foregoing, since 1961 the plaintiffs have abandoned their plans to develop the

[2] The sale was later canceled and the deposit refunded.

property for residential purposes. It is concluded that (1) the use and enjoyment of the property for residential purposes was seriously interfered with by the single engine jet aircraft which began to operate regularly at the air station in July 1955; (2) there was no greater interference with the use and enjoyment of the property in August 1961 (the alleged date of taking) than at times preceding December 5, 1957 (six years prior to the filing of the petition); and (3) the risk of airplane crashes in the vicinity of the air station which existed in August 1961 was no different in nature or degree than had existed long prior to December 5, 1957.

18. The record contains evidence as to valuation of the plaintiffs' property at relevant times, and the parties have requested findings on valuation based on the record. However, this report will omit such findings because the issue is determinable on liability.

Conclusion of Law

Upon the foregoing findings of fact and opinion, which are adopted by the court and made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are not entitled to recover and the petition is dismissed.

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